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## THE DISTRIBUTION OF POLITICAL FAITH

JACK M. BALKIN\*

### I. A RISING OR A SETTING SUN?

The original title of *Constitutional Redemption*<sup>1</sup>—which my publisher prevailed on me not to use—was “Agreements with Hell.” The phrase comes from a famous statement of the abolitionist William Lloyd Garrison—himself drawing on the words of the prophet Isaiah—that the United States Constitution was “a covenant with death, and an agreement with hell.”<sup>2</sup> By agreeing to protect slavery, the Framers had embedded evil in the constitutional system, and Garrison believed that the only remedy for this original sin of constitutionalism was to dissolve the Union, and for the North to secede from the South.<sup>3</sup>

Much of *Constitutional Redemption* is a meditation on Garrison’s famous argument. It is true enough that slavery is gone. But the Constitution-in-practice still has elements that maintain, preserve, or actively promote injustices. As soon as we begin to identify these elements, of course, we will begin to disagree about what they are and how serious the injustices really are. But that was true of the days of slavery, an institution that everyone now agrees was deeply unjust. And that is why the example of slavery is so useful in the present. We rarely if ever face a system in which *everyone* is agreed that serious injustices are serious and unjust. Rather, no matter how great the evils

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\* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. A symposium like this one gives me many reasons to be grateful, and many different people to thank. First, I would like to thank Steve Kiehl and the editors of the *Maryland Law Review*, and Professors Mark Graber and Danielle Citron for helping to organize this published symposium. Second, I would also like to thank Sanford Levinson and the University of Texas for hosting and organizing the live event at which the papers in this symposium were first presented. Third, I am grateful to the contributors to the symposium for producing such a rich and interesting set of essays.

1. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*].

2. *Id.* at 5 (citing WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963)). The origin of Garrison’s famous phrase is *Isaiah* 28:18 (King James): “[Y]our covenant with death shall be disannulled, and your agreement with hell shall not stand.”

3. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, at 5.

of social life, various people—including often quite powerful people—always have reasons to defend these aspects of social life, to argue that they are not so unjust or serious, to maintain that attempting to remedy them would cause even greater harms, and so on. Injustice does not appear naked before us; it is always cloaked in rationalizations and defenses, shrouded in controversies and disagreements. That is why it is so difficult to gain agreement on what is just and unjust.

But suppose that we grant that the Constitution-in-practice, even today, maintains serious injustices. Why should we maintain faith in the constitutional system? Does it have sufficient resources to redeem itself over time? Even if it does, why must we wait so long to achieve significant progress? And if it really is a covenant with death and an agreement with hell, why should we continue to invest political efforts in the Constitution? Why should we put ourselves on its side and attempt to redeem it in history? Perhaps the obstacles, or the cost, are just too great. Perhaps we should just start over.

Constitutions are imperfect things, made by imperfect people in moments of conflict and compromise, and as they are built out the conflicts and compromises continue. So we always begin constitutional politics in the midst of an agreement with hell. Yet this is not where we are always fated to end up. The message of *Constitutional Redemption* is that the American Constitution, and its associated institutions, traditions, readings, and practices, are not incorrigible; and that there is always the possibility—although not the certainty—of political redemption.

The Constitution was not finished at the time of its adoption. It was and always is a work in progress. That is both a symptom of its imperfections and a source of its potential improvement. The Constitution asserts its legitimacy, but for the constitutional project as a whole to be legitimate, people must believe that it is sufficiently worthy of their respect to justify the State's coercion of themselves and others. And because for many people it is not currently worthy of respect, people must have faith that, despite its current imperfections, it can become so over time.

For many people, the problem of constitutional faith does not even arise. Many people may be reasonably comfortable with the status quo; still others, whether out of patriotism, inertia, or both, may believe that the system is just fine as it is. For such people, constitutional faith is not particularly difficult; indeed, it may not be all that important. But for people who find themselves as dissenters, who see serious injustices, and who worry that the country is careening out of

control, constitutional faith is quite important. For these people, the Constitution-in-practice is not worthy of their veneration and respect. Fidelity to the constitutional project—and to the Constitution itself—therefore requires faith in the eventual redemption of the Constitution. Constitutional redemption is not guaranteed, and even when it arrives, it is never complete, it is never perfect, and it is never entirely innocent. Yet the possibility of constitutional redemption underwrites faith in the current system, especially for constitutional dissenters. With such faith, our agreement with hell might yet become a charter of redemption; without such faith, it remains a covenant with death.

Harvard University Press objected to calling the book “Agreements With Hell.” One reason they objected was that they thought the title was too reminiscent of Samantha Power’s best selling, Pulitzer Prize-winning book, *A Problem from Hell*,<sup>4</sup> although of course Garrison’s phrase had been well known for a century and a half. The second reason was that they thought that a book entitled “Agreements with Hell” was a downer, and wouldn’t sell (which, I admit, is in some tension with the first reason). One can only imagine what they would have thought about *Sinners in the Hands of an Angry God*.<sup>5</sup>

I still wanted to use the title “Agreements with Hell.” It was the original title of one of the chapters in the book, it was arresting, and it captured the ambivalent and complicated nature of constitutional faith. Still, they demurred. Could I think of something more uplifting as a title? “All right,” I said, “how about a book called *Constitutional Faith*?” Then I thought, “Oh no, that one’s already been taken.”<sup>6</sup> Finally, I settled on *Constitutional Redemption*, and the word “faith” appears in the subtitle.

The subtitle speaks of political faith, not constitutional faith, and the distinction is important. One might well have faith in politics, but not faith in the Constitution, or, for that matter, politics that is constrained by the Constitution. This is a central point of Aziz Rana’s contribution to this symposium.<sup>7</sup>

Faith is not simply a calculation of costs and benefits discounted to the present. It involves an attachment to the constitutional project;

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4. SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2003).

5. Jonathan Edwards, *Sinners in the Hands of an Angry God*, in SELECTED SERMONS OF JONATHAN EDWARDS 78–97 (H. Norman Gardiner ed., 1904).

6. SANFORD LEVINSON, CONSTITUTIONAL FAITH (rev. ed. 2011) (1988) [hereinafter LEVINSON, CONSTITUTIONAL FAITH].

7. Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015 (2012).

that is why I say that it involves putting ourselves on the side of the Constitution. Faith in the Constitution means supporting it, promoting it, and trying to fulfill its promises in our own day. Faith is a gamble on something that may not come to pass. Moreover, because the Constitution is fallen, and people are imperfect, progress under the Constitution may not occur; the day of redemption may never come.

The uncertainty of faith is symbolized by the book's cover, taken from a painting by Frederic Edwin Church, a member of the Hudson River School, whose artists were famous for their dramatic landscapes.<sup>8</sup> Church himself was well known for his spirituality and his striking use of light.<sup>9</sup> I suspect that many people think that the cover is optimistic, even romantic, in its hope for the future. After all, doesn't the painting show the light of a new day breaking through dark and stormy clouds?

Actually, it doesn't. The point is that just from the four corners of the painting we cannot determine whether we are witnessing a sunrise or a sunset. What looks like redemption could actually be decline and descent into darkness.<sup>10</sup>

On the last day of the Constitutional Convention in Philadelphia, Benjamin Franklin made a similar point. As the delegates were signing the draft Constitution, Franklin, looking at a picture of the sun on the horizon painted on the back of George Washington's chair, remarked:

I have . . . often in . . . the vicissitudes of my hopes and fears . . . looked at that [sun] behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is indeed a rising and not a setting Sun.<sup>11</sup>

Franklin's speech is a statement of constitutional faith. The sun may be rising or setting on the American experiment in governance. We cannot be sure. That is why faith is necessary. For if we lack faith, our fears of political failure may turn out to be a self-fulfilling prophecy, and the sun will turn out to be a setting sun.

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8. See The Hudson River School, THE METROPOLITAN MUSEUM OF ART, [http://www.metmuseum.org/toah/hd/hurs/hd\\_hurs.htm](http://www.metmuseum.org/toah/hd/hurs/hd_hurs.htm) (last visited April 20, 2012).

9. William S. Talbot, *American Visions of Wilderness*, 56 THE BULLETIN OF THE CLEVELAND MUSEUM OF ART, 151, 159, 163 (1969).

10. Adrian Vermeule's *New Republic* review noted the cover's dual meaning. Adrian Vermeule, *Ideals and Idols*, NEW REPUBLIC (June 8, 2011, 12:00 AM), <http://www.tnr.com/book/review/constitutional-redemption-jack-balkin>. Vermeule's work on the Constitution features the theme of uncertainty and the problem of second best, so he is particularly well-situated to understand the painting's ambivalence.

11. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 1787, at 648 (1911).

In order not to keep you in suspense, the actual title of Church's painting is "Twilight in the Wilderness." It is a picture of a sunset, not a sunrise, and it was composed in 1860, just before the Civil War, which some hoped (and others feared) would be the end of the Union.<sup>12</sup> If we think that we are watching a sunrise, it is because we want it to be a sunrise, because we have optimism, or hope.

## II. SKEPTICISM ABOUT CONSTITUTIONAL FAITH

Several of the contributors to this symposium ask whether we should have faith in the American constitutional system. Aziz Rana, for example, points out that constitutional faith can be counterproductive: "[T]he commitment to constitutional continuity" in our history, he argues, "actually undermined—rather than facilitated—the possibility of a truly emancipatory and anti-colonial politics."<sup>13</sup> America's "failure to . . . embrace rupture and to break from constitutional faith played a critical role in sustaining practices of subordination."<sup>14</sup> Rana concludes that, "depending on the circumstances, constitutionalism may be just as likely to inhibit transformative change as to foster it."<sup>15</sup>

Rana does not suggest that progressives should go out of their way to disobey the Constitution. Instead, he argues, they should be pragmatic. The discourse of constitutionalism may sometimes benefit progressive causes, but in other cases it will not. Therefore, Rana argues that progressives, rather than committing themselves to working within the constitutional system, should decide in particular cases whether constitutionalism is the best way to achieve their goals. Sometimes, Rana believes, progressives should appeal to the constituent power of the people and adopt extra-legal methods—with the caveat that these methods must always be broadly supported in society.<sup>16</sup>

Sanford Levinson's *Constitutional Faith* analogized fidelity to the Constitution to religious faith.<sup>17</sup> But Levinson has long since given up his constitutional faith and has become a modern day Garrisonian.

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12. Commentary on *Twilight in the Wilderness*, CLEVELAND MUSEUM OF ART, SPECIAL EXHIBITIONS, <http://www.clevelandart.org/exhibcef/highlights/html/3910085.html>.

13. Rana, *supra* note 7, at 1020.

14. *Id.* at 1019.

15. *Id.* at 1020.

16. *Id.* at 1047 ("[P]olitical discretion—if exercised on behalf of a broad constituency, one able to provide such practices with widespread popular legitimacy—has the potential to be both transformative and democratic.").

17. See LEVINSON, CONSTITUTIONAL FAITH, *supra* note 6, at 9–17 (describing America's veneration of the Constitution and Americans' use of the Constitution "as the center of a genuine community of faith").

He argues that hardwired rules and taken-for-granted practices that he calls the Constitution of Settlement are both dysfunctional and undemocratic.<sup>18</sup> Therefore, Levinson argues, constitutional faith is counterproductive; we need a new constitutional convention.

Faith—or rather, the loss of faith—is also at the center of Andrew Koppelman’s contribution.<sup>19</sup> John Rawls’s principle of liberal legitimacy presupposed that all reasonable members of the political community could agree on a set of basic constitutional essentials and that a well-ordered society was one in which all reasonable persons could agree on the same basic conception of justice.<sup>20</sup> Nevertheless, Koppelman argues, if the portrait that Frank Michelman and I offer is correct, this is an illusion: our fellow citizens may have very different views of justice; very different notions of the constitutional essentials necessary to legitimacy; and therefore very different views of what the Constitution—construed in its best light—requires.<sup>21</sup> If so, Koppelman asks, perhaps we might lose faith in the legitimacy of our constitutional regime, for it cannot conform to Rawls’s criteria. More to the point, perhaps we will lose faith in our fellow citizens, who may never have the common norms of justice that we naively assumed they shared with us, and who may never agree with us on the most important questions of justice and constitutionalism. Perhaps, Koppelman suggests, the liberal project of constitutionalism is fated to end in betrayal and heartbreak.<sup>22</sup>

H.W. Perry is even more pessimistic. Political science, he argues, demonstrates the enormous obstacles to constitutional redemption in our day. Popular mobilizations will be unlikely to alter a deeply unjust status quo.<sup>23</sup> Perry is fully aware of the long history of redemptive mobilizations in American history: the Jeffersonian revolution, the Jacksonian transformation, Reconstruction’s new birth of freedom, the populist and progressive movements, the New Deal, the civil rights

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18. SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 3–9 (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*]; Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956 (2012).

19. Andrew Koppelman, *Respect and Contempt in Constitutional Law, or, Is Jack Balkin Heartbreaking?*, 71 MD. L. REV. 1126 (2012).

20. *Id.*

21. *Id.* at 1128.

22. *Id.* at 1142–43.

23. H.W. Perry, Jr., *Constitutional Faith, Constitutional Redemption, and Political Science: Can Faith and Political Science Coexist?*, 71 MD. L. REV. 1098, 1107 (2012) (noting “systemic and behavioral features that exist and are growing to thwart protestant constitutionalism in the American political system”).

revolution, the women's movement, the gay rights movement, and the transformation of American politics wrought by successive waves of conservative mobilization. Why don't these examples give us hope that Americans can change their Constitution for the better?

Perry has two responses. First, such examples, and others like them "seem to be more anecdotal than evidence of systematic and systemic behavior."<sup>24</sup> They are stories of the past—sometimes a distant past—not analyses of the present. They are exceptions to a general trend in a political system that is increasingly impervious to reform and unresponsive to popular mobilizations. These "exceptions," Perry believes, "prove the rule" of ever increasing impediments to constitutional transformation.<sup>25</sup> "To a political scientist," Perry argues, "the question is not *can* the system be politically responsive," it is how responsive it is or how likely it is to be responsive.<sup>26</sup>

Perry's second response follows from the first. Even if American history is full of examples of redemptive constitutionalism, the situation has changed. Things are different now. The trend is toward ever greater blockages to change.<sup>27</sup> Unlike the America of previous generations, today's America features a disempowered public and constitutionally unserious politicians in deeply polarized political parties. The Supreme Court enjoys enormous popular legitimacy and it has effectively become the last word on all matters constitutional.<sup>28</sup> These days, Perry believes, it is difficult if not impossible to develop new constitutional ideas that can successfully challenge the Supreme Court's existing doctrines. Americans defer too much to the Supreme Court's view of what the Constitution means and they are unable to effectively oppose it.<sup>29</sup> "[T]he longer the 'expert' judgment of the Court stays in place and is not overturned," Perry fears, "the more difficult it becomes not to see the Court's position as what the Constitution means."<sup>30</sup> To all this, Perry adds the many institutional and political impediments to effective social transformation:

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24. *Id.*

25. *Id.* at 1112 (arguing that robust constitutional debate and dissent will not lead to significant constitutional change over time and "[t]here are structural reasons to think the trend [of increasing impediments to political responsiveness] will continue").

26. *Id.* at 1111.

27. *Id.* at 1112.

28. *Id.* at 1113–16 (describing impediments to effective politics), 1117–20 (noting the powerful institutional legitimacy of the Supreme Court).

29. *Id.* 1119 ("Balkin . . . underestimates . . . how much deference there is to the expertise of the Justices.").

30. *Id.*



the Senate, the Electoral College, federalism, separation of powers, single member districts, [the amendment process of] Article V of the Constitution . . . political parties, the filibuster, the decline in competitive electoral districts, extraordinary protection for incumbents, polarization, the seemingly unstoppable rise of presidential power, the extraordinary role of money in politics, the extraordinary proliferation of undigested information, segmentation of how citizens receive information that encourages people to have their own biases go unchallenged, [and] the decline in structures that encourage civic engagement.<sup>31</sup>

It is possible in theory, Perry argues, that “all of these things could be changed, but there are huge structural barriers to accomplishing this, and I would argue bolstered by much research in political science, that change has become exceedingly more difficult.”<sup>32</sup>

At first glance we might read Perry as putting his faith not in political redemption but political science, a science which, he believes, establishes the limits to possible political change in the United States. Repeatedly he invokes the authority of political science (going back to Aristotle) and his standing as a social scientist.<sup>33</sup> At one point, he even speaks of putting on his “political science vestments,”<sup>34</sup> thus portraying himself as a priest in the church of social science.

Nevertheless, despite its title, Perry’s article does not really establish that political science and political faith are opposed to each other. Much of *Living Originalism* and *Constitutional Redemption* draw on political science literatures to explain how political parties and social movements interact with judicial review and alter constitutional meanings over time.<sup>35</sup> As Perry notes, “Balkin understands how the American political system works as well as any political scientist. . . . He does have some evidence and could find more to counter some of my claims. It is just that he and I are reading the evidence and the tea leaves differently.”<sup>36</sup>

Thus, we have two scholars, looking at much of the same evidence, who come to very different conclusions about whether the

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31. *Id.* at 1122.

32. *Id.* at 1123.

33. *See id.* at 1107, 1109, 1113, 1121, 1123.

34. *Id.* at 1107.

35. *See, e.g.,* JACK M. BALKIN, *LIVING ORIGINALISM* chs. 13, 14 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]; BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, chs. 3, 5, 7.

36. Perry, *supra* note 23, at 1107.

American system can redeem itself over time. One is pessimistic, the other is optimistic. Far from a dispute between faith and science, this is a dispute about faith itself.

In *Constitutional Redemption*, I argue that constitutional faith is usually organized around narrative.<sup>37</sup> We believe in the Constitution because we believe in a story about who we are, what we have done, where we came from, and where we are going. Conversely, we lack faith in the constitutional system because of a different story we tell ourselves about who we are, what we have done, where we came from, and where we are going.

The difference between Perry's account and mine is not primarily a disagreement about empirical evidence. I am as aware as he is of the thickening of our political institutions. Indeed, to quote the title of a recent book by Thomas E. Mann and Norman J. Ornstein, things are even worse than they look.<sup>38</sup> Rather, the differences between us depend on the story we tell to interpret this evidence. I believe that our current circumstances are indeed daunting. But history shows that America has often been in the grip of self-destructive politics, when political institutions were deeply corrupt, when selfish or short-sighted elites held a stranglehold on politics, when ordinary people were demoralized, demobilized, or both, and when democracy appeared finally to be losing its grip. Those conditions were also dreadful, but they turned out not to be permanent. This gives us at least some reason to think that our current situation is not permanent either. Things may get worse—every civilization that rises also falls at some point—but they can also get better.

Perry's story, by contrast, is a story of a nation and a political system in decline. Once upon a time we might have had the kind of country, the kind of institutions, and the kind of people that allowed real constitutional transformation. But that is true no longer. Our institutions have decayed, our people are docile or disengaged, our parties are irresponsible, and our Supreme Court is smug, imperial, and unresponsive. And because political legitimacy is also often premised on a background narrative—a story about which direction the country is heading—Perry's is also a story of the accelerating loss of legitimacy in American political institutions.

Perry's account, although appearing in the guise of a social scientific report, is actually an example of a familiar religious trope in

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37. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, at 3.

38. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

American history—a jeremiad, which decries the corruption of social and political institutions and the country’s inevitable decline and fall.<sup>39</sup>

But there are two versions of the jeremiad. The first version is a portrait of desolation; a compendium of the many ways in which we have fallen and our institutions have decayed. It offers little hope of improvement; indeed, each time the list of failings is offered, it seems to grow longer. This is the European jeremiad, and it is closest to Perry’s. In fact, H.W. Perry’s jeremiad is a bit like the well-known account offered by his namesake Perry Miller, who described the Puritan jeremiad as an “uninhibited and unrelenting documentation of a people’s descent into corruption” that was unrivaled in the literature of the world.<sup>40</sup>

The second version of the jeremiad, celebrated by Sacvan Bercovitch in his famous study, *American Jeremiad*, also emphasizes the terrible straits in which Americans find themselves, but it always asserts faith in the possibility of ultimate redemption. Its characteristic feature is a demand for renewal and a call for action. In this version of the jeremiad, our circumstances are not simply punishment for our past wickedness; they present a challenge to be overcome, and an opportunity for self-correction and spiritual rebirth.<sup>41</sup> Faith in the American project, like faith in Providence itself, is necessary despite the odds, precisely because it enables us to imagine how we might overcome our present condition. To succeed, Americans must not despair; they must face their situation clearly and rededicate themselves to their most central values.<sup>42</sup> Indeed, Bercovitch famously criticized Perry Miller’s account for failing to note that the distinctive feature of

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39. As a well-known social scientist of the 7th century B.C. put it:

The ways of Zion do mourn, because none come to the solemn feasts: all her gates are desolate: her priests sigh, her virgins are afflicted, and she is in bitterness.

Her adversaries are the chief, her enemies prosper; for the Lord hath afflicted her for the multitude of her transgressions: her children are gone into captivity before the enemy.

*Lamentations* 1:4-5 (King James).

40. PERRY MILLER, *ERRAND INTO THE WILDERNESS* 8 (1956).

41. SACVAN BERCOVITCH, *AMERICAN JEREMIAD* 7 (1978) (contrasting the European jeremiad, with its “lament over the ways of the world” and the sins of the people, with the American jeremiad, which featured a call for action and renewal).

42. *Id.* at xi (“The American jeremiad was a ritual designed to join social criticism to spiritual renewal, public to private identity, the shifting ‘signs of the times’ to certain traditional metaphors, themes, and symbols.”); see Timothy P. O’Neill, *Constitutional Argument as Jeremiad*, 45 VAL. U. L. REV. 33, 40-41 (2010) (explaining that the American jeremiad was a ritualized process that sought to promote moral progress over time).

the American jeremiad was its “unshakeable optimism” and its “promise of ultimate success.”<sup>43</sup> The American jeremiad was not merely a description of events; it was a rhetorical strategy for thinking about time and history that offered Americans a way to imagine their redemption.

It turns out, then, that both H.W. Perry’s account and my book—which, after all, argues that the Constitution always exists in a fallen condition—are jeremiads. But they are jeremiads of different types. Perry’s story is one of impediments without hope; mine is a story of hope despite impediments. The difference between them is not that one is fundamentally scientific or religious while the other is not. Rather, the difference between them is the difference in the stories they tell to make sense of our current condition; it is the difference, in other words, between the jeremiad of desolation and the jeremiad of renewal.

At first glance, Lani Guinier’s and Gerald Torres’s contribution deliberately distances itself from the question of faith. What we need right now, Guinier and Torres explain, is not constitutional faith; it is constitutional politics driven by the activism of ordinary citizens.<sup>44</sup> Similarly, what we need is not redemption; it is redistribution of resources and opportunities to ordinary people. “Belief alone,” they explain, “does not assure change. We can all speak constitutional truth, but the only constitutional truth that matters is that which is backed by power.”<sup>45</sup>

Even so, questions of faith bubble up to the surface of their argument, and by its end, they offer a remarkable contrast to the darker visions of Andrew Koppelman and H.W. Perry. As Guinier and Torres explain, what is important is not faith in the Constitution as an abstract entity. It is faith in the political power of ordinary people—the people who will talk back to institutions and the elites who run them, and the people who will force society to take account of their claims of justice and injustice.<sup>46</sup> “[F]aith in the Constitution,” Guinier and Torres maintain, “has to be faith in the possibility of citizen participation in an ongoing set of institutions.”<sup>47</sup> “[I]t is faith in the capacity of

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43. BERCOVITCH, *AMERICAN JEREMIAD*, *supra* note 41, at 7–8. This trope continued long after the founding of the United States. “In virtually every area of life,” Bercovitch explained, “the jeremiad became the official ritual form of continuing revolution.” *Id.* at 141.

44. Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1069–70 (2012).

45. *Id.* at 1064.

46. *Id.* at 1065–66.

47. *Id.* at 1063.

political struggle to lead us to imagine and construct a future in which the liberatory ideals of our framework documents can be rooted that is most important.”<sup>48</sup>

Jamal Greene’s essay also does not appear to be about constitutional faith, at least on the surface. Rather, he is interested in why conservative originalists neglect the Fourteenth Amendment, and he argues that they do so because of the cultural narratives that underwrite their originalism.<sup>49</sup> But it turns out that the idea of faith is quite important to his anthropological account.

As noted above, *Constitutional Redemption* argues that constitutional faith is usually organized around narratives, in this case stories about the country, the Constitution, and the American people.<sup>50</sup> Greene’s anthropology of originalism builds on this point. Originalists, he argues, believe in narratives of permanence, continuity, and restoration, and the Fourteenth Amendment, which is redemptive in character, and open to the future, is ill-suited to this kind of story.<sup>51</sup>

Conservative originalists, Greene argues, seek authority from imagined heroic practices of the past; not from the fulfillment of a promise in the future. The Fourteenth Amendment arises out of constitutional failure; it points accusingly at a past world of injustice that can only be redeemed by transformation of the status quo. It is not a vision of a return to better days but a marker of present deficiency and a symbol of future fulfillment. It therefore sits awkwardly with what Greene calls the “cultural affinity” of conservatives.<sup>52</sup> To accept the Fourteenth Amendment fully, Greene contends, would severely test the constitutional faith of many conservatives, because that faith is based on permanence, constancy, and a return to past verities. That is why he believes conservatives have so much difficulty embracing an amendment organized around narratives of constitutional redemption and transformation; instead they must selectively misremember the Fourteenth Amendment, or downplay its centrality to the American constitutional tradition.<sup>53</sup>

Greene somewhat overstates the case: many contemporary conservative originalists are quite interested in the history of the Four-

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48. *Id.* at 1066.

49. Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980–83, 1014 (2012).

50. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 1, at 3.

51. Greene, *supra* note 49, at 1002–03 (arguing that “the Fourteenth Amendment better enables redemptive than restorative constitutional narrative”).

52. *Id.* at 1014.

53. *Id.* at 1008.

teenth Amendment, and their number is increasing. Yet the reasons why conservative originalists have become interested in the Fourteenth Amendment are actually consistent with Greene's larger point.

One obvious reason why conservative originalists might become more interested in the Fourteenth Amendment is that they can increasingly deploy the Amendment and its history to promote conservative substantive agendas. Supporters of gun rights can use the history of the Fourteenth Amendment to show that the Reconstruction framers believed that an individual right to bear arms in self-defense was a fundamental right.<sup>54</sup> Libertarian conservatives have been interested in the Fourteenth Amendment for two reasons. First, one can use the history of the privileges or immunities clause and the 1866 Civil Rights Act to justify increased protection for economic freedoms of property and contract.<sup>55</sup> Second, libertarians generally support the application of the Bill of Rights—including particularly the Second Amendment—to the states. Therefore the original understanding of the privileges or immunities clause is quite important.

But there is a deeper reason why we should expect that conservative originalists generally—and not just conservative libertarians—will increasingly focus on the Fourteenth Amendment. Conservative originalists, like everyone else, face the task of showing that their preferred methodology can explain or justify central features of the existing constitutional regime. That is because the democratic legitimacy of the Constitution depends not only on the initial act of adoption, but also on the continuing popular acceptance of the Constitution-in-practice, which includes the New Deal and the civil rights revolution. Judges who forthrightly stated that they would not be bound by the regime's basic commitments would undermine their claim to authority in the constitutional system.<sup>56</sup> Recognizing this fact, liberals and living constitutionalists have repeatedly tried to attack originalism on the ground that it cannot explain *Brown v. Board of Education*,<sup>57</sup> *Loving*

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54. See, e.g., STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT AND THE RIGHT TO BEAR ARMS 1866–1876 (1998) (arguing that the framers of the Fourteenth Amendment clearly sought to protect the right of the freedmen to bear arms in self defense and recognized the right to bear arms as a fundamental individual right); MICHAEL KENT CURTIS: NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 104 (1988) (“Among the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States [was] the right to bear arms.”).

55. See, e.g., Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5 (2012); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334 (2005).

56. BALKIN, LIVING ORIGINALISM, *supra* note 35, at 114–15.

57. 347 U.S. 483 (1954).

*v. Virginia*,<sup>58</sup> *Griswold v. Connecticut*,<sup>59</sup> and contemporary guarantees of sex equality.<sup>60</sup> Moreover, as the commitments deemed important or fundamental to the regime change, so too do the list of cases or results that all “reasonable” legal professionals must accept as correct.

Changes in the constitutional canon thus pose a continuing problem of legitimacy for conservative originalists. Consistent with a narrative of permanence, conservative originalists generally talk as if the legal meaning of the Constitution is fixed at the time of adoption. Unfortunately, the constitutional commitments of the constitutional regime are not fixed, but continue to change—sometimes quite significantly—over the years.

Originalist judges and scholars who wish to be thought in the mainstream—as opposed to “off-the-wall”—must find ways to square their methodology with the central assumptions of an ever-changing constitutional regime. One way to do this is by accepting an ever broader list of non-originalist precedents—as Justice Antonin Scalia does. These precedents are admittedly inconsistent with the Constitution’s meaning, but we accept them nevertheless in the interests of stability.<sup>61</sup> But this strategy may be self-defeating in the long run. As the number of non-originalist precedents grows, original meaning becomes increasingly irrelevant to most constitutional questions.

A far more promising solution for conservative originalists is to rework their understanding of originalism’s commitments and entailments so that the current set of canonical cases were always correct. Returning to the historical sources, contemporary originalists discover that earlier originalists were mistaken and that the regime’s commitments are—and always have been—consistent with the permanent meaning of the Constitution. All that contemporary originalists need to do is take account of changed factual circumstances and assumptions by the adopting generation that have proved to be factually mistaken.<sup>62</sup>

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58. 388 U.S. 1 (1967).

59. 381 U.S. 479 (1965).

60. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 12–19 (2010) (criticizing originalism because it cannot explain many deeply embedded principles of American constitutional law).

61. Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 139 (Amy Gutmann ed., 1997) (“The whole function of the doctrine” of stare decisis “is to make us say that what is false under proper analysis must nonetheless be held true, all in the interests of stability.”).

62. See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 9, 11–12, 53 (2011) (arguing that sex equality is guaranteed by principles against caste legislation, but that the Fourteenth Amendment’s framers and adopters labored under a series of factual misconceptions about the sexes). Calabresi argues that fol-

These changes in originalist conclusions, in turn, can be explained in terms of better tools and greater theoretical precision. An earlier generation of originalists lacked the historical and methodological sophistication of later generations, who, happily, can correct the errors of their elders. In particular, the need to square originalist methodology with the strongly egalitarian features of the current constitutional regime inevitably leads originalists—particularly in the generations after Raul Berger, Robert Bork, Edwin Meese, and Antonin Scalia—to take a fresh look at the Reconstruction-era Amendments.

Moreover, retooling originalism to justify modern egalitarian decisions does not undermine conservative cultural affinities; if anything, it reinforces them. If originalists can show that *Brown*, *Loving*, *Griswold*, and the 1970s sex-equality decisions are consistent with original meaning, then there is no need to see the Fourteenth Amendment as fundamentally *redemptive*. The Fourteenth Amendment does not require that we update the Constitution or make it more just over time through continuous constitutional construction. Rather, these results were *always* implicit in the Fourteenth Amendment's original meaning; therefore, enforcing these results is completely consistent with a narrative of permanence and restoration.

In sum, Greene may be right that conservative originalists are troubled by narratives of redemption and prefer narratives of restoration.<sup>63</sup> But this suggests that conservative originalists will increasingly be drawn to investigate the Fourteenth Amendment as time goes on in order to preserve their constitutional faith. Indeed, in *Living Originalism* I noted that it was only a matter of time before some very clever conservative originalist tried to show that the original meaning of the Fourteenth Amendment protects homosexuals as well as blacks and women.<sup>64</sup> If gay rights ever become as taken for granted as racial and sexual equality, then conservative originalists will have to show why the Constitution's original meaning, rightly understood, has always implicitly protected the rights of homosexuals (at least when one controls for changes in factual context). In such a constitutional regime, conservative originalists will have to work gay rights into narratives of constitutional permanence and restoration in order to preserve their

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lowing ratification of the Nineteenth Amendment, "sex discrimination became unconstitutional as to all civil rights," while Rickert argues that "Section One always could have been legitimately read to prohibit laws discriminating on the basis of sex." *Id.* at 68 n.321.

63. See Greene, *supra* note 49, at 999 ("[T]he more one focuses on redemption, the less one believes in originalism.").

64. BALKIN, *LIVING ORIGINALISM*, *supra* note 35, at 118.



constitutional faith. And, if current trends continue, that day is not far off.<sup>65</sup>

### III. THE PREDICAMENTS OF POLITICAL FAITH: DISTRIBUTION, DREAD, AND IDOLATRY

In *Constitutional Redemption*, I argue that when we say we have faith in the Constitution, we are not simply saying that we have faith in a particular *text*; we are also saying that we have faith in a *people* and in the development of the *institutions* of constitutional democracy through which popular will is expressed.<sup>66</sup> Therefore what is redeemed is not simply a set of promises in a document, but a trans-generational constitutional project and a people. Behind a constitution are the people who live within its political framework. Political faith is a bet not on particular words but on the members of a political community who chose to live—or not to live—by these words.

This connection between faith in the American Constitution and faith in the American people is implicit in several of the contributors' essays. Some contributors have lost faith in the public: Andrew Kopelman fears that the people may let each other down, and H.W. Perry believes that ordinary citizens are disaffected and powerless. Other contributors retain faith in the people: Lani Guinier and Gerald Torres see the energy of ordinary citizens as the Constitution's last best hope, while Aziz Rana places his faith not in the Constitution but in democratic extra-legal and extra-constitutional mobilizations at crucial points in history.

Political faith turns out to be a very complex idea, and, as we shall now see, it is better to think of it not as a single entity but as a composite—a distribution of faith and lack of faith, an economy of hope and fear.

#### A. *Political Faith as a Distribution or Economy*

Asking whether one has faith or should have faith is often quite misleading. Rather, the real question is more likely to be the *assignment* or *distribution* of faith across various people, institutions, and projects. Imagine a sort of law of conservation of faith, analogous to

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65. Steven Calabresi's recent argument that the Fourteenth Amendment bans caste and class legislation generally, and prohibits all discrimination based on sex, might seem to suggest that states may not discriminate between same-sex and opposite-sex marriage, although he has not (yet) reached that conclusion. See generally Calabresi & Rickert, *supra* note 62.

66. See BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 1, at 8, 26.

the law of conservation of matter and energy. Faith is not simply extinguished; rather, it shifts from one object to another. This is not a perfect analogy, of course, because it is difficult to quantify the actual amount of faith one has, and so it would be hard to establish that this number never changes.

Perhaps more correctly, we should say that faith is a *distribution* among various aspects of one's world. One's faith—and one's corresponding lack of faith—is *distributed* over various people, institutions, and things. One believes in *A* rather than *B*, one puts one's trust in *C* and fears *D*. Thus, even if one lacks faith in something or someone, it does not follow that one lacks faith entirely. Rather, one puts one's trust elsewhere. Complete lack of faith in anything and everything is rare, because faith is necessary not only to ground and justify action, but also to situate us in our environment. A person who did not believe in anything might not even be able to get out of bed in the morning. Therefore whenever we are confronted with denials of faith in something or someone, it is important to probe further and ask where the speaker actually places his or her faith. Often fervent denials of faith in one thing are accompanied by equally strong belief in other things not present.

A similar point applies to situations in which faith seems to be absent or irrelevant. A change in circumstances or perspective may show us where one's faith is placed. I noted earlier that for many people, constitutional faith is not necessary because they believe the regime is fine as it is. The issue of faith is submerged for people in these circumstances. Yet although it is submerged, it has not necessarily disappeared. The question of constitutional faith would arise again if people began to fear that an adequate constitutional system would start to get markedly worse. Faced with this threat, some people might lose faith in the system (placing their trust elsewhere), while others would vigorously reassert their faith in order to correct the constitutional system and combat the perceived threat. An example is the constitutional rhetoric of the Tea Party. The Tea Party emerged after the victory of Barack Obama in the 2008 election. Tea Partiers were mostly conservative Republicans or conservative independents who generally supported the status quo but who had been disappointed by the presidency of George W. Bush.<sup>67</sup> After the elec-

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67. See e.g., THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* (2012) (noting that the Tea Party is a generationally bounded variant of long-standing strains of American conservative populism that has reshaped the Republican Party); SCOTT RASMUSSEN & DOUG SCHOEN, *MAD AS HELL: HOW THE TEA PARTY MOVEMENT IS FUNDAMENTALLY RESHAPING OUR TWO-PARTY SYSTEM*

tion, they suddenly became terrified that Obama would take away their constitutional liberties and turn the United States into a secular European-style socialist state. At this point, Tea Partiers began vigorously reasserting their constitutional faith, invoking what Jamal Greene describes as narratives of restoration.<sup>68</sup> Whether or not one agrees with the Tea Partiers that Obama was a genuine threat to the Constitution, his election made salient their latent constitutional faith.

Scott Shapiro argues that an economy of trust and distrust undergirds the practice of interpretation: we understand authors' choice of language in terms of the degree of trust and distrust that one should have in subsequent interpreters.<sup>69</sup> In the same way, we might speak of an economy of faith and lack of faith. The question is not so much *whether* people have faith, but *where* people place their faith, hope, or trust; and equally important, where they place their fears, their lack of trust, and their despair.

We might think of faith as part of a *nested opposition* between what one believes in and what one does not believe in, or between what one trusts and distrusts.<sup>70</sup> What one hopes for and what one fears, what one trusts and what one distrusts are often systematically related to each other. One believes in *A* because one cannot believe in *B*; one puts trust in *C* because one has been disappointed or betrayed by *D*; one cleaves to *E* because one is quite certain that *F* is false or untrustworthy, and so on. Moreover, when we say that a person has lost faith in someone or something, we might ask whether what has really changed is their distribution of trust and distrust, their personal economy of hope and fear.

We can see the distribution of faith in the work of several of the contributors to this symposium. A particularly good example is Sanford Levinson's neo-Garrisonianism. Levinson no longer places his faith in the Constitution; rather, he places his faith in the American people themselves to create a new Constitution. To the extent that Levinson believes that the Article V process for calling a new constitutional convention is minimally adequate, then he actually retains con-

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184–86 (2010) (noting the Tea Party's disillusionment with George W. Bush's lack of fiscal restraint).

68. See Greene, *supra* note 49, at 981 (“A narrative of restoration urges us to adopt the values of the past because the past was a better time and, therefore, has a stronger normative claim on American identity.”).

69. SCOTT J. SHAPIRO, *LEGALITY* 331–52 (2011).

70. J.M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669, 1671 (1990). A nested opposition is one in which the two opposed terms depend on each other, rely on each other, or turn into each other over time. *Id.* at 1671, 1676–77.

stitutional faith. It is not faith in the Constitution as a whole, but only in those parts that allow us to transition to a new Constitution—along with the Preamble, which states the basic purposes of our constitutional enterprise.<sup>71</sup>

To the extent that Levinson believes that the Article V convention process is also defective,<sup>72</sup> then Levinson is arguing for something like the 1787 Philadelphia Convention, which was more or less illegal under the rules of the then existing Articles of Confederation. The Articles were styled as “perpetual,” and Article XIII required unanimous consent by all the states to any subsequent amendments.<sup>73</sup> The document that emerged from Philadelphia allowed ratification by three quarters of the states, and further amendments with less than the consent of all of the states.<sup>74</sup> In short, Levinson has not abandoned his constitutional faith. He has simply placed it elsewhere, in the American people acting through an Article V constitutional convention, or acting outside the Constitution in a new, technically illegal, convention.

Aziz Rana’s political pragmatism may seem to be the very opposite of faith. “[F]aith in our constitutional tradition,” he explains, “has historically embodied one important roadblock to a more thoroughgoing redemptive politics.”<sup>75</sup> Precisely because “the commitment to constitutional continuity has at key moments undermined progressive political principles, we today should be wary of seeing constitutionalism as *the* privileged path to redemption.”<sup>76</sup> Instead, “the lesson for progressives might be to deemphasize constitutional faith and to develop more politically instrumental approaches to the value of constitutionalism.”<sup>77</sup>

Yet Rana’s argument is also premised on an economy of faith, and a distribution of trust and distrust. Rana places his faith in the possibility of political redemption outside the Constitution. Moreover, he has faith that if progressives engage in extra-constitutional pol-

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71. Cf. Levinson, *How I Lost My Constitutional Faith*, *supra* note 18, at 974 (“[M]y fondest hope—which I realize is likely to be unrealized—is that Americans would come to recognize the need for a new constitutional convention.”); *id.* at 964, 974 (praising the Preamble).

72. Cf. *id.* at 969 (criticizing the Article V amendment process). If a convention resulted in new amendments, these might have to run the same Article V gauntlet that Levinson criticizes, unless Article V is amended first.

73. ARTICLES OF CONFEDERATION OF 1777, art. XIII, para. 1.

74. U.S. CONST. art. V; *id.* art. VII.

75. Rana, *supra* note 7, at 1026.

76. *Id.*

77. *Id.*

itics, their actions will not come back to haunt them. “[D]espite fears of illiberality and unchecked power, self-avowed progressives should be much more willing in American political life to challenge constitutional faith and—at times—even to advocate popular discretion and legal rupture.”<sup>78</sup> Using Reconstruction as an example, Rana argues that “extra-legal discretion and federal military imposition, in the name of political justice, were essential for the fulfillment of equal freedom for all.”<sup>79</sup> In these circumstances, “political necessity suggested that, at this moment of historical upheaval, substantive commitments to egalitarian redemption on the one hand and to a discourse of constitutionalism on the other were opposed ends—in which one could be achieved but not both simultaneously.”<sup>80</sup>

To be sure, violating the Constitution to achieve political redemption might backfire. Progressives might overreach and, unconstrained by legal and constitutional traditions, undermine civil liberties and democracy. Choosing the wrong moment for extra-legal action might lead to backlash and failure, discrediting progressive ambitions for a generation or more. Finally, reactionary forces might decide to use the very same strategies, making it difficult for progressives to complain that their opponents are violating constitutional and legal norms that progressives refuse to accept themselves.

Rana is fully aware of these difficulties. Nevertheless, he argues that progressives should be willing to take the risk: “The lesson is that progressives should be less afraid of political discretion and more instrumental in their endorsement of constitutional principles and languages.”<sup>81</sup> This is a gamble, and therefore requires a leap of faith. “[P]olitical discretion—if exercised on behalf of a broad constituency, one able to provide such practices with widespread popular legitimacy—has the potential to be both transformative and democratic.”<sup>82</sup> When the political conditions are right, “constituent power may well be generative and democratic rather than despotic; at the same time constitutionalism and frameworks of constitutional construction can simply promote a coercive rule-by-law.”<sup>83</sup>

These moments are inevitably tragic, Rana explains, because they always have unexpected consequences and always create new forms of

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78. *Id.* at 1020.

79. *Id.* at 1043.

80. *Id.*

81. *Id.* at 1046.

82. *Id.* at 1047.

83. *Id.* at 1048.

hierarchy and oppression along with new freedoms.<sup>84</sup> But the potential gains are worth the effort. “If the goal of progressives is a transformative and ultimately political one,” Rana explains, “faith should reside in the ideal of effective and equal freedom alone,” and sometimes this may require a politics of “constitutional rupture” justified by broad democratic support.<sup>85</sup>

Rana’s argument for extra-constitutional democratic discretion is premised on a faith that progressives will act appropriately, that they will choose the right moment to act, and that reactionary forces will not be able to play the same game in a way that destroys progressive accomplishments. In short, Rana may not have faith in the constitutional system, but he clearly has faith in other things.<sup>86</sup>

*B. Constitutional Faith and Constitutional Dread*

Just as faith may undergird legitimacy, so too may the absence of faith in any alternative political order. We can see this point in Richard Epstein’s response to Sanford Levinson’s call for a new constitutional convention:

I would fight against this general approach with every fiber of my being. It is not because I think that the current state of affairs is ideal, when manifestly it is not. It is rather that I think that any revision of the document will move us dangerously along a path of greater and more powerful government at the national and state levels that will only make matters worse.

This assessment derives in large measure from Levinson’s implicit subtext that he is in favor of a more expansive government, which is at direct odds with my own view that the previous expansions of federal power have put burdens upon taxpayers that have greatly constricted their liberty.

The overall message is this. The convocation of new conventions will introduce a new degree of uncertainty that is likely to make matters worse not better. It is commonly said of taxes that old taxes are better than new ones, because

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84. *Id.* at 1049–50.

85. *Id.* at 1048.

86. Rana’s political faith—which elevates the pursuit of justice over constitutional order—is the opposite of Mark Graber’s theory, discussed *infra* text accompanying notes 90–101, which chooses constitutional peace over constitutional justice.

people can adapt to them. That is true of constitutions as well.<sup>87</sup>

Epstein believes that the current constitutional regime is very unjust because it constrains human freedom in so many different ways. Therefore it has serious problems of legitimacy. I am not sure whether he believes that the current regime is so unjust and offers such little hope of improvement that he believes that it is illegitimate.

Nevertheless, it is clear that Epstein believes that a new constitutional convention would lead to an even worse state of affairs. Whether or not Epstein thinks that the current system is worthy of respect, he distrusts any alternative that would come from abandoning the current Constitution. Whether or not he has constitutional faith, he has constitutional fear; even if he has no constitutional hope, he has what I shall call *constitutional dread*. Rather than placing his faith in the status quo, Epstein places his fear and his distrust in the unknown. He would rather work within the (imperfect and unjust) Constitution he has than risk a new constitution written by the likes of Sanford Levinson. As Levinson has pointed out, many liberals have a symmetrical fear of a new constitutional convention led by Sarah Palin and members of the Tea Party.<sup>88</sup> So perhaps many liberals, along with their constitutional faith, also have constitutional dread.

To be sure, Epstein does not disclaim interest in improving the Constitution-in-practice. He claims to put himself on its side; he offers what he believes are the best accounts of various constitutional provisions, including, for example, the Commerce Clause.<sup>89</sup> So perhaps Epstein's position is not one of pure political fear after all. Perhaps he believes that our Constitution can become more libertarian over time, and that it is worth trying to convince people that his libertarian interpretations are the best ones.

In *Constitutional Redemption*, I note the connections between constitutional faith and constitutional legitimacy for dissenters who believe that the Constitution-in-practice is very unjust. Political faith in the future allows them to accept the legitimacy of an otherwise defective political system. Epstein's example suggests another aspect of po-

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87. Richard Epstein, *Richard Epstein Responds to Levinson's Jeffersonian Proposal*, LIBERTY L. BLOG (Mar. 8, 2012), <http://libertylawsite.org/post/richard-epstein-responds-to-levinsons-jeffersonian-proposal/>.

88. See Levinson, *How I Lost My Constitutional Faith*, *supra* note 18, at 975–76 (noting symmetrical fears on the left and right about the possibility of fundamental constitutional change).

89. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

litical faith not emphasized in *Constitutional Redemption*—the connections between political legitimacy and political dread.

Some people may accept the current system not because they believe that it is morally or democratically adequate, but because they fear an even worse system will emerge that will have even less legitimacy. These people ground their acceptance of the regime not in constitutional faith in a better world but in constitutional dread of a worse one.

Constitutional dread is an inversion of constitutional faith. A person who acts from constitutional dread believes that the current system—unjust as it may be—is likely to be better than the alternatives. Such a person has a kind of constitutional faith. But what dominates their worldview is not hope for a better tomorrow, but fear of what change might bring. This account of political legitimacy—one based on dread rather than hope—is closer to Thomas Hobbes than to Frederick Douglass.

Mark Graber's account of constitutional legitimacy in *Dred Scott and the Problem of Constitutional Evil*<sup>90</sup> strikes a middle ground. It involves a mixture of constitutional dread and constitutional faith.<sup>91</sup> Graber believes that political peace is the most important value to preserve in a constitutional system. It is so important, in fact, that we should be willing to sacrifice constitutional justice for constitutional peace.<sup>92</sup> Social peace is especially valuable because constitutional breakdowns may produce great evils—especially as military technology makes the prospect of open warfare increasingly deadly.<sup>93</sup> But peace is also valuable because peace holds out the hope of a stable

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90. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

91. It is an interesting accident that the case that best represents constitutional evil for many Americans is *Dred Scott*, and that the plaintiff's first name, Dred, is a homonym for "dread." Because *Dred Scott* is evil—because it reflects a vision of America that was once central to our constitutional system but that we do not want to accept as characteristic of us—it is something to fear, and therefore something to deny at all costs. The book's title—*Dred Scott and the Problem of Constitutional Evil*—enhances the unconscious linkage between the evil of the slaveocracy on the one hand, and fear of our complicity with and responsibility for evil on the other. But Graber draws the opposite conclusion from most people: constitutional evil is the result of political bargains and institutional settlements, and not necessarily the result of mistaken constitutional interpretation. Sometimes, constitutional evil is the price we pay for constitutional peace. Sometimes we must accept constitutional evil because the alternative would be even worse.

92. *Id.* at 5–6 ("[P]resent-day constitutional theorists have an even more pressing duty to explore whether constitutional peace should ever be sacrificed in the name of constitutional justice.").

93. *See id.* at 253–54 ("Adversaries for the remainder of human history will have the capacity to inflict catastrophic damage on each other whenever they are unable to resolve disputes over justice peaceably.").



politics that can eventually produce a more decent world.<sup>94</sup> When we become too “obsessed with [constitutional] justice,” Graber argues, we will tend to “ignore[] how constitutions function best by creating the conditions under which political order can be preserved, enabling ordinary politics to be concerned with justice.”<sup>95</sup>

Graber’s distribution of faith thus turns out to be the opposite of Aziz Rana’s. Whereas Rana elevates the pursuit of justice over the preservation of constitutional and legal order, Graber’s political faith chooses constitutional peace over a possibly reckless quest for justice.

In his contribution to this symposium, Graber argues that the very idea of constitutional redemption depends on the purposes we ascribe to the Constitution.<sup>96</sup> Looking at the Preamble, we can see that justice is only one of these purposes—others include “insur[ing] domestic Tranquility” and “provid[ing] for the common defence.” Realizing the Constitution’s goals requires attention to these multiple values and the important tradeoffs between them. Hence, Graber argues, fidelity to the Constitution and belief in its redemption might require us to accept constitutional evil if we want to redeem the Constitution’s ability to keep social order, maintain a working politics, and forestall foreign threats.<sup>97</sup>

In fact, Graber points out, it may be far easier to believe in constitutional redemption if we make social order and national security as important as justice. People may disagree strenuously about what is just and unjust, but they will find it easier to agree whether the state has successfully prevented riots and repelled foreign invaders. Moreover, to continue as a going concern, a state already must secure peace and keep its citizens safe from external enemies, but real justice might be a distant hope that may never come to pass.<sup>98</sup>

Graber’s model of constitutional faith is a mixture of faith in the Constitution’s ability to maintain social peace (as opposed to justice) coupled with constitutional dread at a regime that foolishly undermines the possibility of a peaceful politics in the quest for too much justice too soon. “Americans,” Graber writes, “do not exercise consti-

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94. See *id.* at 178 (“The constitutional commitment to maintain union and the social peace was both an end in itself and the best way to guarantee the conditions under which citizens are most likely to abandon their evil practices.”).

95. *Id.* at 6.

96. Mark A. Graber, *Redeeming and Living with Evil*, 71 MD. L. REV. 1073, 1089–91 (2012).

97. *Id.* at 1093 (“Efforts to redeem faith in a constitution that ensures domestic tranquility are likely to conflict with efforts to redeem faith in a constitution that establishes justice.”).

98. *Id.*

tutional fidelity when they singlemindedly seek to establish justice at the expense of such other constitutional purposes as the common defense and domestic tranquility.”<sup>99</sup> Sometimes, he admits, “the constitutional faithful will actively seek to redeem evil,”<sup>100</sup> and “accommodate and live with those citizens whose practices we find abhorrent”<sup>101</sup> because they believe that is the price of securing other constitutional goods. For Graber, some kinds of constitutional fidelity cannot be extricated from constitutional dread.

Can constitutional dread—as opposed to constitutional hope—form the basis of constitutional legitimacy? The liberal principle of legitimacy argues that a state is legitimate when all reasonable persons would consent to the state’s use of force against them and others. Now if a very unjust constitution seems the best that one can do, and if one fears that forsaking it would lead to an appreciably worse state of affairs, or to the breakdown of social order, then all reasonable persons might consent to it, and therefore constitutional dread might be a basis for political legitimacy. This is not the liberalism of hope, or even Rawls’s liberalism of reasonable overlapping consensus, but the liberalism of dread. It is a Hobbesian liberalism, which may not be very liberal at all, because it may accept a great many restrictions on liberty, not to mention equality.

Thus, this vision of constitutional dread is not the same as Judith Shklar’s well-known “liberalism of fear.” Shklar rejected Hobbesian authoritarianism and argued that fear of cruelty and evil should drive liberals to protect liberty and individual rights.<sup>102</sup> But a Constitution that we keep out of fear of something far worse may not even respect individual liberty. Certainly Richard Epstein’s opposition to a new constitutional convention does not arise from a belief that the current system adequately protects individual freedom. Rather, he defends the current system of government in spite of its (in his view) out-of-control statism.

Nevertheless, constitutional dread might cause people to put themselves on the side of the Constitution-in-practice and defend it from those who would seek to change it. The point of defending the Constitution-in-practice, despite its injustices, would not be in the hope of ultimate redemption but to hold off an even worse form of government.

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99. *Id.* at 1095.

100. *Id.*

101. *Id.*

102. Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21, 21–38 (Nancy L. Rosenblum ed., 1989).

These examples show that some people may cleave to the Constitution out of fear rather than hope. Nevertheless, it is more likely that many people's views about the Constitution are a complicated mixture of political faith and political dread. People hope that the Constitution can be redeemed over time, and they fear abandoning it for an uncertain future. Phrased in this way, we can view constitutional faith and constitutional dread not as contradictory or incompatible, but as parts of a larger distribution of faith and distrust that may constitute political faith for many people.

*C. Political Faith and the Problem of Idolatry*

If faith and lack of faith form a nested opposition, then what one believes in is often uncannily dependent on things that one does not trust. Once these connections are made plain, faith may have to be reevaluated. We see this problem in the Psalmist's admonition that "[i]t is better to trust in the Lord than to put confidence in man. It is better to trust in the Lord than to put confidence in princes."<sup>103</sup> Princes, after all, are only human. But the problem is, so are the members of any organized religion and any church hierarchy. If believing in God means believing what one is taught about God by priests, rabbis, and ministers, then there is always the danger that one is putting one's faith in human beings, who, through organized (and therefore human) religion, present only imperfect, fallible representations of the divine. One has to believe that these religious traditions are not lying to us about what God is and what He wants. In this way we arrive at a nested opposition: faith in the Lord becomes mediated by faith in what it is better not to have faith in.

The nested opposition between the work of God and the work of human beings brings us to the problem of idolatry. Monotheism is premised on the rejection of idol worship. Idols are not divine because they are made by human beings. One should not worship what is made by mortals; it will only mislead and stupefy us.<sup>104</sup> Yet belief in God is generally encountered through participation in a religious community, whose members interpret religious beliefs and construct religious rituals. Thus the initial rejection of idolatry in monotheism

103. *Psalms* 118:8–9 (King James) (italics omitted).

104. Again, the Psalmist advises us:

The idols of the heathen are silver and gold, the work of men's hands.

They have mouths, but they speak not; eyes have they, but they see not;

They have ears, but they hear not; neither is there any breath in their mouths.

They that make them are like unto them: so is every one that trusteth in them.

*Psalms* 135:15–18 (King James) (italics omitted).

always risks a different form of idolatry—the confusion of the community’s creations for the divine will.

Faith in human institutions, or in human projects like the Constitution, cannot be the same as faith in the divine for many different reasons. One reason is the temporal nature of human institutions. God is eternal, but human institutions are not. God does not change (although human representations of God can change); He does not get better or worse. But human institutions can improve or decay; they can be fulfilled or fall apart. One reason why it is better to trust in the Lord than to trust in princes is that princes can die, become corrupt, turn into tyrants, or be overthrown.

What is true of princes is also true of political constitutions generally. They can become corrupt or tyrannical; they can be subverted or overthrown. We know that at some point the Constitution will end. Perhaps it will end well, perhaps it will end badly. But it will not be with us forever. Therefore faith in an institution like the Constitution can only be faith for a certain limited time. Faith in a human institution is faith that we are at a certain point in the lifecycle of an institution—nearer to the beginning than the end. Conversely, faith in an institution that can no longer deliver on its promises risks becoming its own form of political idolatry.

All forms of political faith must reckon with the problem of idolatry, even if they do not succumb to it. The way that the problem of idolatry arises depends on people’s particular distribution of faith, their distinctive economy of trust and distrust.

For example, Torres and Guinier’s “demosprudence” places faith in the ability of ordinary citizens to reshape constitutional meaning through direct action that puts pressure on elites for political change. This is a faith that ordinary people—especially members of subordinated groups acting through social movements—will be able to force elites and existing institutions to listen to them. Moreover, it is a faith that ordinary citizens will use their bottom-up popular power to push for changes that are actually just.<sup>105</sup>

Torres and Guinier’s constitutional faith is distributed between ordinary citizens, whom they trust, and elites and existing institutions, whom they (mostly) do not. Their faith is also a distribution of faith among different types of mobilizations with different political goals. For example, Torres and Guinier probably have faith (or at least they hope) that certain conservative mobilizations, like the contemporary

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105. Torres & Guinier, *supra* note 44, at 1070 (using the example of the Montgomery bus boycott).

Tea Party, will not succeed in transforming the Constitution in the long run, while popular mobilizations led by subordinated groups ultimately will succeed.

Torres and Guinier's particular distribution of faith generates the distinctive problem of idolatry they must confront. Even as they place faith in ordinary people, they must avoid romanticizing them because, as they well understand, ordinary citizens, including the most dispossessed members of society, may have illiberal views, may not respect the justified rights of others, and may seek to enforce unjust policies. Torres and Guinier's challenge is to place faith in the political struggles of ordinary people while recognizing people's limitations and maintaining a critical perspective. They must pledge faith in popular mobilizations as a vehicle for constitutional change while recognizing the dangers and pathologies of popular mobilizations. These include not only the dangers and pathologies that arise from cooptation of popular movements by elites and incumbent institutions; they also include the dangers and pathologies that result from the very success of popular movements for political change.

Similarly, Rana's particular distribution of political faith generates distinctive problems of idolatry. Rana's argument for democratic discretion to go beyond the Constitution creates the danger of romanticizing transgression and revolution as means of escaping the Constitution's limitations. As Rana understands, revolutions can backfire, leading to less democracy and fewer protections for human rights, not more;<sup>106</sup> the French, Russian, Chinese, and Cuban revolutions are only the most familiar examples of this phenomenon.

Rana deals with the problem of idolatry through his notion of the tragic. Extra-legal constitutional change—like constitutional change itself—should always been seen as tragic, because of its unavoidable costs, and because of its unavoidable dangers. “Tragic discourse . . . emphasiz[es] the ambiguous nature of any transformative project[;]” it requires “political responsibility” and an appreciation of “the political stakes when breaking from constitutional fidelity.”<sup>107</sup>

One might think that adopting an attitude of constitutional dread avoids the problem of idolatry entirely because constitutional dread puts no faith either in the Constitution as it exists or in a future constitution that would replace it. It has no romance either with the present or with the future. But constitutional dread risks a different

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106. Rana, *supra* note 7, at 1047 (“Given the legal specter of Schmittian dictatorship and the historical experience of totalitarianism, . . . fears [of extra-constitutional discretion] are not to be taken lightly.”).

107. *Id.* at 1051.

problem. By surrendering hope, it risks turning historical contingency into political necessity. By treating the status quo as the best we can do, it closes the door on the possibility of a better future. The problem is not that political dread confuses existing institutions with the divine, but that it risks turning all of the alternative possibilities into demons. That is, constitutional dread turns the unknown into an all-powerful evil deity. If the danger of political hope is naiveté, the danger of political fear is the stunting of political imagination. Constitutional fear risks an unjustified defense of the status quo. It risks the sanctification of the actual—including actual injustices—on the ground that this is likely to be the least bad of all possible worlds.

#### IV. CONCLUSION

*Constitutional Redemption* emphasizes the role of faith in the constitutional project. But, as we have seen, there are few concepts more complicated. First, people do not simply have faith; rather, they have a distribution of faith and lack of faith, trust and distrust, that is projected onto different features of their world. Changes in circumstances that shake their perceptions may subtly alter this economy or distribution. Second, the inversion of political faith, political dread, may be as important as faith itself for some members of the political community, and what we call “faith” may actually be a complex combination of trust and distrust, hope and fear. Third, the apparent absence of political faith may be deceptive; when circumstances change suddenly, faith, dread, or some combination of the two may emerge powerfully. Fourth, our political faith is usually part of a nested opposition—what we believe in and hope for may be uncannily connected to what we distrust or fear. Fifth, political faith always risks political idolatry, and, whether we like it or not, the two concepts are deeply connected. Whatever we happen to believe in, and whatever distribution of political faith and dread, hope, and distrust we hold in our hearts, helps create our own distinctive risk of political idolatry. In politics, as in life itself, nothing is more fraught than faith, even as nothing is so necessary.